

THE UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 21

CAL ENERGY OPERATING CORPORATION¹

Employer

and

Case 21-RC-20182

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS,
LOCAL UNION 465, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record² in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

¹ The Employer's name appears as corrected at the hearing.

² The Employer's motion to correct the hearing transcript is hereby granted. The corrections to the transcript are noted in Appendix A hereto.

3. Petitioner is a labor organization within the meaning of Section 2(5) of the Act and each seeks to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All control operators, plant operators, operators, senior operators, equipment operators, maintenance technicians, non-destructive testing technicians, senior engineering technicians, engineering technicians, lead warehouse workers, warehouse workers, environmental health and safety technicians, resource technicians, chemical technicians, monofill technicians, monofill site coordinators, and purchasing clerks employed by the Employer at and out of its Calipatria, California facilities; excluding all professional employees, office clerical employees, guards, and supervisors as defined in the Act.³

At issue is the supervisory status of senior operators. The Employer argues that senior operators are supervisors within the meaning of the Act and, accordingly, should be excluded. Petitioner contends that senior operators are not supervisors and should be included in the unit.

The Employer is a Delaware corporation engaged in the generation of electrical power and mineral extraction. The Employer operates seven facilities in three designated regions. Its principal offices and three of the production facilities, which constitute one region, are located in Calipatria, California. The current matter concerns the Calipatria facilities

³ The unit description is as stipulated by the parties. The parties also stipulated that it is a unit appropriate for collective-bargaining purposes.

(hereinafter called the “Calipatria facilities”). There are approximately 140 employees in the proposed unit, including the four disputed senior operators.

The Calipatria facilities operate 24 hours a day. Each region has one operations supervisor who reports directly to the operations manager, Simon Agustin (“Agustin”). The operations supervisors oversee the operation during the day shift (about 8 a.m. to 5 p.m.), while senior operators oversee the operation during the night shift (about 5 p.m. to 8 a.m.). The Calipatria facilities are staffed with 30 plant operators, 16 control operators, and six operators (collectively the “operator employees”), among other employees. The record revealed conflicting testimony regarding whether any employees report to the senior operators.⁴ The operator employees and the senior operators work 12 hour shifts either from 8 a.m. to 8 p.m. or from 8 p.m. to 8 a.m. The four senior operators have rotating schedules so that they each work the night shift. The senior operators report directly to the operations manager.

The primary function of the senior operators is to make sure the equipment in the three facilities is ready to operate and is operating under prescribed parameters.⁵ Senior operators spend about 30 to 40 percent of their time in the office and the remaining time in the field. While in the office, the senior operators review e-mails, reports, and work orders so as to prioritize maintenance work to be done on the equipment and then make recommendations to maintenance. These recommendations are derived from the senior operators’ experience and their knowledge of how critical a piece of equipment is to the process. In the field, the senior

⁴ Agustin first testified that the operator employees report to the operations supervisors or, if they are working a night shift, to the senior operators. However, when the hearing officer later specifically inquired whether any employees report to the senior operators, Agustin testified that no employees report to the senior operators.

⁵ The record discloses that senior operators have no hand in establishing the prescribed parameters.

operators make sure everything is operating within the prescribed parameters by inspecting the control rooms, looking in log books, and taking samples. If the senior operator determines there are “issues,” they take steps to resolve those issues.⁶ The record contains conflicting testimony as to whether senior operators are equipped with cell phones, pagers and vehicles in the performance of these functions.

According to the record, in an emergency, the senior operators have the authority to direct employees to remedy the situation without consulting with the operations supervisor. This responsibility extends to every shift the senior operators work, notwithstanding whether it is a day or night shift. Senior operators also direct employees to meet the company production standards. For example, they may tell an employee to increase production on a machine for a certain amount of time.

A senior operator may also temporarily transfer an employee from one facility to another, but may not do so permanently. Thus, if a facility is engaged in a task that requires an additional employee, the senior operator may send an employee to that facility to help perform the particular task.

The record discloses that the senior operators have the authority to allow employees off work and to require them to work overtime. With regard to letting employees off early, however, the record also discloses that the exercise of this authority is infrequent and sporadic. Thus, the only incident cited in the record was described as a “special case.”⁷

⁶ The record fails to completely develop the issues a senior operator may face and what steps they would take to resolve the issues.

⁷ Jerry Galarte, formerly a senior operator testified that he was never informed that such decisions would be part of his job as a senior operator, he “just did it.” Although he did not check with anyone before relieving the employee, he informed the operations supervisor.

Similarly, with regard to the authority to direct overtime, only one example was cited where a senior operator “asked” an employee to stay overtime until someone else arrived to work.

The record reveals that senior operators have the authority to stop an employee from working if the employee is doing “something wrong,” although no examples were cited where the authority had been exercised. Thus, a senior operator may tell an employee to stop work, but the senior operator must then contact the operations manager or higher management⁸ to handle the situation, as they do not have authority to do anything other than stop the employee from continuing to work.

With regard to issuing discipline, the record discloses that senior operators may recommend discipline, but in any instances, the operations manager conducts an independent investigation of the matter. Any performance issues are reported and investigated in the same manner.

The record reveals that the senior operators do not have the authority to lay off or recall employees, or to promote employees. While senior operators make recommendations about promotions to the operations manager, the operations manager will make an independent review of any recommendations. In addition, Agustin stated that the senior operators attend supervisory meetings. However, the record does not reflect the content of the discussions at those meetings or the senior operators’ role in the meetings.

The record discloses that senior operators usually began working for the Employer as an operator or a plant operator, then progressed to a control operator and then a senior operator. The senior operators earn about ten percent more than the control operators and

⁸ Higher management is always on call.

are paid an hourly wage. All employees, including the operations manager, receive the same benefits. The operator employees and senior operators wear the same uniforms while the operations supervisor and the operations manager do not wear uniforms.

Section 2(11) of the Act specifically excludes supervisors from coverage under the Act. Specifically, Section 2 (11) reads:

The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in Section 2(11) of the Act. Rather, possession of any one of them is sufficient to confer supervisory status. Chicago Metallic Corp., 273 NLRB 1677, 1689 (1985). Consistent with the statutory language and the legislative intent, however, it is well recognized that the disjunctive listing of supervisory indicia in Section 2(11) does not alter the requirement that a supervisor must exercise independent judgment in performing the enumerated functions. Thus, the exercise of supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner does not elevate an employee into the supervisory ranks, the test of which must be the significance of the judgment and directions. Opelika Foundry, 281 NLRB 897, 899 (1986). The burden of proving supervisory status rests on the party alleging that such status exists. Tucson Gas & Electric Co., 241 NLRB 181 (1979). The Board will refrain from construing supervisory status too broadly, because the inevitable consequence of such a construction is to remove individuals from the protection of the Act. Quadrex Environmental Co., 308 NLRB 101, 102 (1992).

Applying these principles to the instant case, I find that senior operators are not supervisors as defined in Section 2(11) of the Act. The record reveals that the senior operators do not assign work or direct employees with the requisite discretion or independent judgment. Rather, the record discloses that the senior operators' principal role at the jobsite is to oversee that the operation of the equipment remains within the parameters established by management. Indeed, the primary function of the senior operators was described as making sure the equipment is ready to operate and that it is operated properly. Thus, senior operators work within fixed parameters that have been defined by management, which is insufficient to confer supervisory status. Quadrex Environmental Co., supra at. 101. In addition, the record reveals that the direction provided by the senior operators during emergency situations is based on their experience and the guidance provided by management. Such direction is also insufficient to establish supervisory status. S.D.I. Operating Partners, 321 NLRB 111, 111 (1996); Chevron Shipping Company, 317 NLRB 379, 381-382 (1997).

Although the evidence does demonstrate that the senior operators have the authority to move employees around, require them to work overtime to release them, it appears that such situations are infrequent. The record reveals that the senior operators only move employees around in rare situations such as emergencies or when there is a shortage of employees. Agustin specifically stated that senior operators only have the authority to require employees to work overtime if there is an emergency. When the hearing officer asked whether senior operators have to check with the operations supervisors before directing employees, Agustin answered, "[d]uring emergency situations or immediate action situations they do not," thereby implying that in other situations they do. Indeed, the record reveals that operations supervisors are on call 24 hours a day. The sporadic exercise of authority over the employees'

schedules is insufficient to establish supervisory status. Davis Memorial Goodwill Industries, 318 NLRB 1044, 1045 (1995).

The record further reveals that the senior operators may stop an employee from working if they are unfit to work, although no specific incidents were cited where this has ever occurred. The record is clear, however, that the senior operator must always contact higher management to handle the matter and to decide any appropriate discipline. Thus, this exercise of authority does not demonstrate independent judgment. Rather, the authority exercised is a routine and based on common sense, driven by an urgent situation and the senior operators' primary function of making sure the equipment is properly operated. Such authority is insufficient to confer supervisory status on the senior operators. Bowne of Houston, Inc., supra at p. 1225; S.D.I. Operating Partners, supra at p. 111.

With regard to the senior operators' ability to recommend discipline, the record reveals that the senior operators report incidents appearing to require discipline, but that the operations manager then independently investigates the matter. Artcraft Displays, Inc., 262 NLRB 1233, 1234 (1982). Similarly, the fact that the senior operators make recommendations for promotion is inconsequential because there is no evidence that management acts on the basis of the senior operators recommendations, or that any personnel actions whatsoever are based on those evaluations. "[A]uthority simply to evaluate employees without more is insufficient to find supervisory status." Passavant Health Center, 284 NLRB 887, 891 (1987). Moreover, the record reveals that recommendations are independently investigated and determined by upper management.

The Employer contends that the senior operators are supervisors, citing Dale Services Corp., 269 NLRB 924 (1984) and NLRB v. McCullough Environmental Services, Inc.,

5 F.3d 923 (5th Cir. 1993). The Employer argues that like the employees in those cases, senior operators are supervisors because they have the authority to transfer personnel to different facilities, to respond to emergencies, to prioritize and direct work, to require overtime and to authorize early departures from work. The Employer further contends that the senior operators effectively exercise such authority within the meaning of Section 2(11) of the Act. The Employer emphasizes that the senior employees are the most senior employees working in the Employer's facility between 5 p.m. and 8 a.m. as those in Dale Services Corp., who were found to be supervisors, and that unless they are found to be supervisors, there is no supervisor during the night shift.

In Dale Services Corp., the Board held that the senior operators of a sewage treatment plant were supervisors within the meaning of the Act because the senior operators had "the ability to assign specific tasks...based on the senior operators' assessment of the employees' abilities and the expertise required." Dale Services Corp., 269 NLRB 924, 924-925. Moreover, the Board noted therein that the senior operators "have the authority to evaluate the workload, and, consequently, to assign overtime work to operators; to send operators home in the absence of work; and to call both operators and maintenance employees in to work, all without the managers' prior approval. In the course of their duties, senior operators must make operational decisions regarding the adjustment of equipment. These decisions are based on knowledge and experience, and require the exercise of discretion." Id.

In NLRB v. McCullough Environmental Services, Inc., the court found that a group of lead operators were supervisors under the Act. The Court there specifically noted that the lead operators decided which employee performed a task, reassigned employees during

shifts, and instructed workers to finish their work. NLRB v. McCullough Environmental Services, Inc., supra at 941-942.

Contrary to the cases cited, the senior operators in the present case do not act with the requisite discretion or independent judgment. Specifically, senior operators do not evaluate employees' skills or assign work based on employees' skills. Moreover, as discussed, the record reveals that in exercising any authority, senior operators follow parameters defined by management, or are guided by their experience, which is insufficient to confer supervisory status. Quadrex Environmental Co., supra at 101 S.D.I. Operating Partners, supra at 111; Chevron Shipping Company, supra at 381-382.

Although senior operators have the authority to move employees around, require them to work overtime or release them, the record reveals these instances are rare, revealing that this authority is sporadically and infrequently exercised, which is also insufficient to establish supervisory status. Davis Memorial Goodwill Industries, supra at 1045. In contrast, the employees determined to hold supervisory status in Dale Services Corp., supra and NLRB v. McCullough Environmental Services, Inc., supra, regularly exercised such authority. In addition, the Employer's claim that here, as in Dale Servicing Corp., the senior operators are the most senior employees during the night shift is not dispositive of their status. As the Board has noted, "being the senior employee on the night shift does not create a supervisor;" supervisory authority must still be established. Ribbon Sumyoo Corp., 308 NLRB 956, 967 (1992). Solely standing as the most senior employee during a shift, even in the absence of on-site supervision, in the absence of supervisory indicia, is insufficient to confer supervisory status. See NLRB v. Res-Care, Inc., 705 F.2d 1461, 1467 (7th Cir. 1983); Vanport Sand and Gravel, Inc., 267 NLRB

150, 150-151 (1983); Lindenmeyr/Munroe, 303 NLRB 143, 148 (1991) and the cases cited therein.

The Employer also argues that there is sufficient secondary indicia of supervisory status so as to confer supervisory status on the senior operators. Primarily, the Employer asserts that management and other employees regard the senior operators as supervisors. To the contrary, although Galarte testified that the employees went to him for advice, the record is devoid of any evidence indicating that the employees regarded him to be a supervisor. Thus, it appears that his advice was sought because of his experience and knowledge of the operations. Bowne of Houston, Inc., supra at 1224. Moreover, the record fails to disclose that the senior operators consider themselves supervisors.

The Employer also argues that management considers senior operators to be supervisors. Although the record reveals that the senior operators attend management meetings, the record does not disclose the role the senior operators play in those meetings nor does it disclose the subjects discussed at the meetings. In addition, the record discloses that management never informed Galarte that as a senior operator he has the authority to let employees off early or that he had any other authority. While Agustin testified that senior operators are “supervisors,” “conclusionary statements made by witnesses in their testimony, without supporting evidence, do not establish supervisory authority.” Sears, Roebuck & Co., 304 NLRB 193 (1991).

Finally, the Employer submits that senior operators are supervisors because they have offices and because they are paid higher wages. It is well settled that secondary indicia cannot transform an employee into a supervisor in the absence of any evidence that the employee possesses at least one of the statutory indicia. J. C. Brock Corp., 314 NLRB 157, 159 (1994);

Meaden Screw Products, 325 NLRB No. 142 (1998). As discussed above, the Employer has failed to establish that the senior operators possess primary indicia of supervisory status. In view of the foregoing, and the record as a whole, I find that senior operators are not supervisors as defined in Section 2(11) of the Act, and I shall, therefore, include this classification in the unit.

There are approximately 140 employees in the unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period, and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are those employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by International Brotherhood of Electrical Workers, Local Union 465 AFL-CIO.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters in the unit and their addresses which may be used to communicate with them. Excelsior Underwear Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, two copies of an alphabetized election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. North Macon Health Care Facility, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in Region 21, 888 South Figueroa Street, Ninth Floor, Los Angeles, California 90017, on or before March 31, 2000. No extension of time to file the list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement herein imposed.

NOTICE OF POSTING OBLIGATIONS

According to Board Rules and Regulations, Section 103.21, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of 3 working days prior to the day of the election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club

Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by 5 p.m., EST on April 7, 2000.

DATED at Los Angeles, California, this 24th day of March, 2000.

/s/Victoria E. Aguayo
Victoria E. Aguayo
Regional Director, Region 21
National Labor Relations Board

177-8520
177-8560-5000

APPENDIX A
Corrections to the Hearing Transcript

<u>Page</u>	<u>Line</u>	<u>Change</u>	<u>To</u>
10	20	plan	plant
3	4	Augustin	Agustin
14	14, 19, 22	Augustin	Agustin
15	11	flushes	flashes
34	22	union	guidance